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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY VARELA CORRALES, Defendant and Appellant.	E053889 (Super.Ct.No. RIF10003084) **OPINION**

APPEAL from the Superior Court of Riverside County. Eric G. Helgesen, Judge. (Retired judge of the Tulare Mun. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified.

Carla Castillo, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Lise Jacobson and Collette C. Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

In this "cold case," defendant Anthony Varela Corrales was charged in 2010 with a murder that occurred in 1989. The victim was shot and killed while trying to help a friend repossess a pickup; the pickup was parked outside defendant's home and belonged to defendant's sister's boyfriend.

The key contested issue was identity. The police found unfired shotgun shells in defendant's bedroom and car that matched a fired shotgun shell found at the scene. Two of defendant's acquaintances testified that he had made statements admitting the shooting. Defendant testified, however, that a friend of his, who had died before trial, had admitted being the shooter.

A jury found defendant guilty of first degree murder (Pen. Code, §§ 187, subd. (a), 189), with an enhancement for the personal use of a firearm (Pen. Code, § 12022.5, subd. (a)). Defendant admitted one prior serious felony conviction. (Pen. Code, § 667, subd. (a).) He was sentenced to a total of 35 years to life in prison, plus the usual fines and fees.

Defendant contends that his trial counsel rendered ineffective assistance by:

1. Failing to object to evidence that defendant was in possession of three firearms other than the murder weapon.

2. Failing to object to certain sexual references in jailhouse phone calls between defendant and his ex-girlfriend.

3. Failing to object to the $10,000 restitution fine based on postcrime amendments allowing the court to consider defendant's ability to pay.

We reject all three contentions. On our own motion, however, we have identified two sentencing errors, both arising out of the trial court's mistaken failure to apply the law that was in effect in 1989. We will modify the judgment accordingly.

I

FACTUAL BACKGROUND

A. *The Prosecution's Case*.

Defendant's family lived in a house on Selkirk Avenue in Riverside. Defendant and his then-girlfriend, Henrietta ("Cha-Cha") Chavez, occupied the attached garage, which had been converted into a bedroom.

Defendant's sister was dating Johnnie Kimberling, who lived next door. Kimberling owned a white Mitsubishi pickup. As Kimberling knew — and defendant's family also knew — the truck was subject to repossession; to prevent this, Kimberling parked it in their driveway.

Ronald Faria was employed as a repossessor. Robert Hensley, his friend and roommate, often helped him out to make some extra money. On the night of February 2-3, 1989, around 2:20 a.m., they located the white Mitsubishi pickup truck in the driveway of defendant's house. However, it was "pinned" between two other vehicles; this meant that they were not going to be able to repossess it that night.

They got out of their tow truck and checked the vehicle identification number to make sure that they had the right vehicle. As they were walking back toward the tow truck, a man yelled something like, "I got you, motherfucker," and fired one blast from a

shotgun. Hensley fell to the ground. He had been struck by six double-ought pellets, in the head, neck, and back. He died of these wounds within minutes.

Faria saw the shooter run from a dirt area in front of the house back toward the house. The shooter was holding a "long gun." Faria described him as either White or Hispanic, in his 20's, between five feet eight and five feet ten inches tall, with a thin build and dark shoulder-length hair. Defendant fit this description.

Rita Ballesteros regularly used drugs with defendant. A path across a field connected his house and hers. At 3:30 or 4:00 a.m., defendant showed up at her house. He said he needed a ride to a "safe place," so she drove him to a motel.

Defendant seemed nervous. As he got into Ballesteros's car, he said, "I don't think I killed him because he fell and jumped back in the truck." He then added, "Do not ever repeat anything or something will happen."

About 5:30 a.m., the police arrived at defendant's house. Inside the garage, they found two people, both asleep: Donna Roberts and Chris Powers.

Powers and defendant were close friends, "like brothers." Powers had died before trial.

Roberts was dating defendant's brother. According to Roberts, around 11:00 p.m., she went to sleep in the garage. She was awakened by the sound of a gunshot. The only other person in the garage was Powers; he was asleep beside her. She went back to sleep.

In front of the house, the police found a fired 12-gauge shotgun shell and wadding. Just outside the door of the garage, they found a second fired shell. It was Federal

Premium Magnum brand, 12-gauge and double-ought. The lack of ejection marks indicated that it had been fired from a break-action shotgun, not a pump-action or semiautomatic.

Inside the garage, in a box on the floor, the police found two live shells of the same brand, gauge, and shot size. In a side yard, they found two more live shells, again of the same brand, gauge, and shot size.

Archie Yates testified that he bought drugs from defendant and Powers. He had seen them with shotguns "[m]any times." They kept a sawed-off shotgun under the dashboard of a car.

Around February 5, defendant told Yates that he "shot a boy . . . in the back of the head that he had caught trying to take a truck out of the[] driveway." He said he had used a 12-gauge shotgun. He added that anyone who "told on him . . . would get the same thing."

On or about April 20, 1989, Yates was arrested for possession of a stolen vehicle. He voluntarily told the police what he knew. He suggested two places where they could find defendant, one on Lomita Street and the other on Cook Street. He also said that defendant and Powers would be in either a blue Datsun 280Z or a blue Chevy Nova. Yates did not request any leniency; he merely asked to be placed in protective custody, because he was afraid of defendant and Powers.

On April 20, 1989, the police went to the location on Lomita. There they found a blue Datsun 280Z "associated with" defendant; inside it, they found several live shells of

the same brand, gauge, and shot size as the shells found at the scene. One was from the same batch or lot as the fired shell found outside the garage.

On April 21, 1989, the police went to the other location, on Cook. When they got there, they saw a blue Nova. They also saw defendant and Powers walking in a carport area. Defendant was carrying a cylindrical object wrapped in a cloth.

Powers surrendered immediately. Defendant, however, ducked into a carport. As he came back out, the police arrested him. In the back of the carport, wrapped in a cloth, they found a semiautomatic 12-gauge sawed-off shotgun. It was loaded with shells that were "similar" to the shells they had already found.

The Nova belonged to Powers. Inside it, the police found a loaded 20-gauge shotgun. They also found two 20-gauge and two 12-gauge shotgun shells.

While they were incarcerated in adjoining cell blocks, defendant threatened Yates. He yelled, "Keep [your] mouth shut, don't say anything. You know what will happen to you if you do." As a result, at a 1989 hearing in the case, Yates "took the Fifth Amendment."

B. *The Defense Case*.

A gunshot residue test of Powers's hands was "highly indicative" (though not conclusively indicative) of the presence of gunshot residue.

Chavez, defendant's former girlfriend, testified that, on February 2, 1989, sometime before dark, she and defendant got into an argument; he packed his clothes and

left. She fell asleep in the house while watching a movie. If defendant had come back home, he would have woken her up and taken her back out to the garage.

Defendant took the stand in his own defense. He admitted 10 prior felony convictions between 1977 and 2002, including convictions involving drugs (sale of a controlled substance, transportation of a controlled substance, and possession of marijuana for sale) and weapons (possession of a loaded firearm in public, possession of an illegal weapon, and possession of a firearm by a felon).

Defendant testified that he was cheating on his girlfriend with Ballesteros. On the night of the shooting, he and Ballesteros were at a motel, using drugs, from about 10:45 p.m. until about 4:45 a.m.

According to defendant, a day or two after the shooting, Powers admitted that he was the shooter. He said that he had been outside defendant's garage, making a hiding place under the dashboard of his car for a shotgun. When he saw "two guys" on the other side of the house, he was "all loaded and panicky"; he thought "they were going to come around and get him from behind," so he fired.

Defendant denied making any incriminating statements to Ballesteros or to Yates.

Defendant admitted that Kimberling was "a good friend" and that they "used to do favors for each other . . . ."

C. *Prosecution Rebuttal.*

In April 1989, when the police first interviewed defendant, he said that, on the night of the shooting, he left the house around 8:00 p.m. after an argument with Chavez.

However, he did not say that, when the shooting occurred, he was at a motel doing drugs with Ballesteros. He also did not say that Powers had confessed to the shooting. When asked if he would protect his neighbor's property, defendant said he "definitely" would.

In June 2010, the police interviewed defendant again. This time, he did say he was at a motel. At first, he said he was there alone; then he said he was with a "guy and a girl." When asked if Ballesteros was there, he said no. Once again, he did not say Powers had confessed, even though by then Powers was dead.

II

FAILURE TO OBJECT TO THE EVIDENCE OF DEFENDANT'S POSSESSION OF FIREARMS

Defendant contends that his trial counsel rendered ineffective assistance by failing to object to evidence of defendant's possession of three firearms.

As noted, when defendant was arrested, he was in possession of a shotgun. In addition, in defendant's bedroom, under his mattress, the police found two .22-caliber handguns. Defense counsel did not object to any of this evidence.

" . . . 'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's

actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.] If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]' [Citation.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 391.)

" . . . 'When the specific type of weapon used to commit a homicide is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed. There need be no conclusive demonstration that the weapon in defendant's possession was the murder weapon. [Citations.] When the prosecution relies, however, on a specific type of weapon, it is error to admit evidence that other weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons.' [Citations.]" (*People v. Tahl* (1967) 65 Cal.2d 719, 741-742.)

We begin with the shotgun. The People argue that this "may have been the same weapon used to commit the murder . . . ." But not so. The prosecution relied on evidence that the murder weapon was a break-action shotgun; shells had to be manually ejected. By contrast, the shotgun defendant had when he was arrested was a semiautomatic.

Nevertheless, the evidence of defendant's possession of the shotgun was admissible because the shotgun was loaded with *shells* that were similar to the one used in the murder. Defendant's possession of such shells was significantly probative and not unduly prejudicial.

By contrast, the fact that defendant was in possession of two .22-caliber handguns was not particularly relevant. However, as just discussed, defendant's possession of a semiautomatic shotgun when he was arrested was admissible. In addition, Yates testified that he had seen defendant and Powers with shotguns "[m]any times." Defendant admitted three prior weapons-related felony convictions. Any additional prejudice from the fact that defendant had two handguns was minimal.

Moreover, this evidence was potentially helpful to defendant. He could argue that, if he had wanted to shoot the victim, he would have used one of these handguns. Consistent with this reasoning, defense counsel not only did not object to this evidence, but cross-examined about it, as follows:

"Q. You located two handguns; correct?

"A. Yes.

"Q. .22's?

"A. Yes.

"Q. You did not locate a shotgun; correct?

"A. No, we did not."

"The decision whether to object to the admission of evidence is 'inherently tactical,' and a failure to object will rarely reflect deficient performance by counsel. [Citation.]" (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1335.) We cannot say that defense counsel's apparently tactical decision not to object to this evidence was objectively unreasonable.

In any event, defendant cannot show prejudice. As already discussed, there was ample other evidence linking defendant to firearms. The evidence regarding the handguns was very brief. There was no evidence that defendant had ever fired the handguns. The murder weapon was clearly a shotgun, not a handgun. We therefore see no reasonable probability that, if defense counsel had successfully objected to the evidence regarding the handguns, defendant would have enjoyed a more favorable outcome.

III

FAILURE TO OBJECT TO THE JAILHOUSE PHONE CALLS

Defendant contends that his trial counsel rendered ineffective assistance by failing to object to portions of jailhouse phone calls between him and his ex-girlfriend.

A. *Additional Factual and Procedural Background.*

At the time of the shooting, Chavez was pregnant with defendant's child. However, they argued a lot, and he had other girlfriends.

Chavez testified that, by the time of trial, she had no feelings for defendant and no relationship with him. She denied any bias for or against him. She claimed that she would not have lied for him in 1989, and she would not lie for him at trial.

The prosecutor and defense counsel stipulated that defendant had made seven jailhouse phone calls to Chavez and that the transcripts of those phone calls were accurate. The prosecutor then played the phone calls for the jury. Defense counsel did not object.

1. *Phone call on August 1, 2010.*

In the first phone call, on August 1, 2010, Chavez said she was going to pay $100 to get defendant's glasses fixed. Defendant responded:

"CORRALES: . . . Cha-Cha you're my friend and you'll always be my friend. . . . [¶] . . . [¶]

"CHA-CHA: Okay, if this was twenty years ago Tony . . . then yeah. . . .

"CORRALES: Yeah, I know.

"CHA-CHA: This little girl was so hooked on you, it wasn't even funny. I couldn't even see straight. You know, I would do anything for you twenty years ago. Twenty years ago, dude, if you would have told me give your fucking kidney, I would have given it to you.

"CORRALES: . . . And see now the tables are turned. . . . Now I'll do anything for you, you know what I'm saying?

"CHA-CHA: No you wouldn't.

"CORRALES: It's a little too late, but I'll do anything. I will do anything for you Cha-Cha.

"CHA-CHA: Nah.

"CORRALES: Yeah. . . . It's my turn to pay you back if I can, I will. I don't care my life doesn't mean nothing to me.

"CHA-CHA: And that's funny Tony 'cause 20 years ago I felt that same way.

"CORRALES: Exactly that why I'm telling you. The shoe's on the other foot now. . . . And I'll do anything for the girls and I'll do anything for you. 'Cause you have always been there for me.

"CHA-CHA: I will always be your friend. [¶] . . . [¶] . . . I will always be here for you."

2. *Phone call on August 6, 2010.*

In the second phone call, on August 6, 2010, defendant expressed frustration about not being able to contact his attorney. Chavez replied:

"CHA-CHA: . . . On Monday I can start making some calls to see who it is.

"CORRALES: Ah-huh. . . .

"CHA-CHA: I don't know what . . . What kind of . . . What kind of pressure I can put on them, but I'm gonna start. . . .

"CORRALES: I . . . I don't know who in the fuck to call.

"CHA-CHA: Well, I'll start calling. . . . I don't want you to think . . . you're alone over there because you're not . . . . I'll start calling. I'll start making calls.

"CORRALES: I guess. See what you can do . . . . See what you can find out at least. [¶] . . . [¶]

"CHA-CHA: I will call who ever it takes until I get an answer what I want to hear."

3. *Phone call on August 10, 2010.*

In the third phone call, on August 10, 2010, Chavez commented that defendant's attorney was "really good," then added:

"CHA-CHA: . . . [Y]ou are not alone okay?

"CORRALES: All right.

"CHA-CHA: I will keep in communications with her as much as I possibly can. And I will do whatever is needed. . . . [¶] . . . [¶] . . . I don't want you to think you are alone right now, 'cause you are not. [¶] . . . [¶]

"CORRALES: . . . I appreciate everything you are doing for me. I really do.

"CHA-CHA: I know you do. . . . So this is what we are gonna concentrate on. Getting you out . . . . Getting you home. But I think I will just concentrate on this trial. Get you out, get you where you should be in life."

4. *Phone call on August 18, 2010.*

In the fourth phone call, on August 18, 2010, there was this dialog:

"CORRALES: The only thing they have against me is the same thing that they had back th[e]n.

"CHA-CHA: I know.

"CORRALES: So and the other one is . . . Rita."

5. *Phone call on September 2, 2010.*

In the fifth phone call, on September 2, 2010, there was this exchange:

"CORRALES: . . . You didn't get the letter I sent you? [¶] . . . [¶]

"CHA-CHA: No I didn't. [¶] . . . [¶]

"CORRALES: Saying what I want to do to you when I get out. *I'm gonna fuck you up*. [¶] . . . [¶]

"CHA-CHA: . . . Don't take this the wrong way but . . . I don't think you could handle this Tony. Sorry.

"CORRALES: Huh?

"CHA-CHA: Well I'm not that 20 year old kid any more. . . .

"CORRALES: Cha-Cha, *I could handle you and twenty of you*. [¶] . . . [¶] . . . [A]ll I can say is, that *when I get out I'll fucking tear your ass up girl*. [¶] . . . [¶]

"CHA-CHA: . . . You keep dreaming of it. [¶] . . . [¶]

"CORRALES: I'll fucking tear you right . . . Oh man I just fucking, it's just that I can't wait until I get out. Yeah, I'll tell . . . I'll show you. I'll teach you a lesson girl. [¶] . . . [¶]

"CHA-CHA: I'm not the 20 year old kid you left 20 years ago I'll tell you that right now.

"CORRALES: I know you're better now. You get better . . .

"CHA-CHA: Huh?

"CORRALES: You get better with age." (Italics added.)

6. *Phone call on October 12, 2010.*

In the sixth phone call, on October 12, 2010, there was this exchange:

"CHA-CHA: . . . And guess who the D.A.'s main focus is on your fucking case?

"CORRALES: Who?

"CHA-CHA: Me. . . . [¶] . . . [¶] . . . I've kept the distance for a reason.

"CORRALES: What?

"CHA-CHA: The . . . For a reason. And I . . . I . . . I can't write it down because if I'm the main focus I don't want anything going that I'm collaborating with you . . . .

"CORRALES: Yeah.

"CHA-CHA: Better be fair. Let them do whatever they need to do to prove, you know what I'm saying?

"CORRALES: Yeah.

"CHA-CHA: And I don't want them to twist words, . . . because when we go to court on this I'm gonna be like . . . Check it out. I want every visit that I have done with him brought forth. I want every contact that I have done with him brought forth. Oh wait, you can't because there isn't any."

7. *Phone call on January 14, 2011.*

In the seventh and last phone call, on January 14, 2011, Chavez said she was taking boxing lessons. Defendant replied:

"CORRALES: What, you want to try and kick my ass?

"CHA-CHA: I can kick your ass anytime I want. [¶] . . . [¶]

"CORRALES: I wouldn't want to kick your ass. *I might lick your ass*, but I won't kick your ass.

"CHA-CHA: Hey, hey, after I'm done kicking your ass, you can.

"CORRALES: Yeah. Shit. [Unintelligible.] *You're dirty as fuck.*

"CHA-CHA: Hey, I may be dirty but I am clean. [¶] . . . [¶]

"CORRALES: I'll bet your ass ain't got the — I mean – *I'll bet your ass ain't clean down there*, nah.

"CHA-CHA: No, but it is firming up, buddy.

"CORRALES: *I'll bet you that motherfucker is nice and plump, huh*? . . . [¶] . . . [¶] Fuck. *I sure could tear that motherfucker up right now*, though. The bee[']s knees. [¶] . . . [¶]

"CHA-CHA: . . . 20 years ago you did not pay attention to me when *I told you . . . you should keep your dick in your pocket*, but you decided not to. So 20 years later, . . . you wish you would have kept your dick in your pocket one time, at least, 'cause maybe you'd have your dick out right about now. But, you know, hey, that's all right.

"CORRALES: That's all right. That's all right. I'm going to make up for lost time, believe me. [¶] . . . [¶]

"CHA-CHA: You know why I'm not writing, right? [¶] . . . [¶]

"CORRALES: Why?

"CHA-CHA: . . . Speak to your attorney. It looks better.

"CORRALES: Does it?

"CHA-CHA: I'm not biased. [¶] . . . [¶]

"CORRALES: . . . I fuckin' miss you. [¶] . . . [¶]

"CHA-CHA: Should have thought of that 20 years ago, too.

"CORRALES: Shut the fuck up. Stupid. You're stupid. *All right, fuckin' bitch. You need a fuckin' lay.*" (Italics added.)

B. *Analysis.*

Defendant complains only about the admission of the fifth (September 2) and seventh (January 14) phone calls, and then only about the admission of the sexual references in those phone calls (italicized above).

Although Chavez was called by the prosecution, she was a key defense witness; she testified that defendant was not at home on the night of the shooting. The phone calls were relevant to show that she had a strong bias in favor of defendant.

Defendant does not really argue otherwise. Instead, he argues that the phone calls, when offered for this purpose, were cumulative in light of the fact that Chavez was the mother of his child and she admitted communicating with him when he was in jail. However, the mere fact that Chavez had a child by defendant did not necessarily mean that she was biased in his favor. Their relationship had ended, and over 20 years had passed. Likewise, the mere fact that Chavez had phoned and visited defendant lacked the impact of the phone calls themselves. The phone calls showed that Chavez was actively assisting defendant with his defense of the case. At the same time, she was trying to

conceal from the prosecution the fact that she was "collaborating" with him. This significantly and appropriately undercut her credibility.

Defendant argues that his sexual references had "little bearing on . . . Chavez's bias." We disagree. To the contrary, they showed that defendant was trying to appeal to Chavez by reestablishing their sexual connection. In other words, he was trying, however crudely, to sweet-talk her. His sexual blandishments were just as relevant as his nonsexual blandishments, such as, "I'll do anything for you" and "You get better with age." The sexual references also were not particularly prejudicial. The jury was well aware that defendant and Chavez had had a romantic, sexual relationship. "Jurors today are not likely to be shocked by offensive language . . . ." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1009.) Meanwhile, defendant was admittedly a drug user and a drug dealer, with 10 prior felony convictions; evidence of what he would have liked to do sexually with his ex-girlfriend was not likely to have any significant additional prejudicial effect.

Thus, if defense counsel had objected to the sexual references as irrelevant or as more prejudicial than probative, the trial court would not have been required to sustain the objection. Defense counsel could also have been concerned that, if the tapes and transcripts were redacted, the jury might speculate about what was missing and might even imagine it to be something worse than it was. For these reasons, defense counsel's failure to object was not ineffective assistance.

IV

FAILURE TO INVOKE AMENDMENTS ALLOWING THE TRIAL COURT TO CONSIDER DEFENDANT'S ABILITY TO PAY A RESTITUTION FINE

Defendant contends that his trial counsel rendered ineffective assistance by failing to assert that, under post-1989 statutory amendments, the trial court could consider defendant's ability to pay a restitution fine.

The trial court imposed a $10,000 restitution fine. Defense counsel did not object and did not argue that the trial court should consider defendant's ability to pay.

In 1989, when the crime was committed, Penal Code section 1202.4 required the court to impose a restitution fine of $100 to $10,000. (Pen. Code, former § 1202.4, subd. (a), Stats. 1984, ch. 1340, § 2, p. 4722; see also Gov. Code, former § 13967, subd. (a), Stats. 1988, ch. 975, § 1, p. 3151.) It expressly provided: "Such restitution fine . . . shall be ordered regardless of the defendant's present ability to pay." (Pen. Code, former § 1202.4, subd. (a), Stats. 1984, ch. 1340, § 2, p. 4722.)

By 2011, however, when defendant was sentenced, Penal Code section 1202.4 required the court to impose a restitution fine of $200 to $10,000. (Pen. Code, former § 1202.4, subds. (a), (b)(1), Stats. 2010, ch. 351, § 9, pp. 1810-1811.) Moreover, it expressly required the court to consider the defendant's ability to pay. (Pen. Code, former § 1202.4, subds. (c), (d), Stats. 2010, ch. 351, § 9, p. 1811.) Defendant was "entitled to benefit from the ameliorative effect" of the amended version of Penal Code section 1202.4. (*People v. Avila* (2009) 46 Cal.4th 680, 729; accord, *People v. Vieira* (2005) 35

Cal.4th 264, 305-306.) However, the trial court's failure to consider the defendant's ability to pay is forfeited if not raised at sentencing. (*People v. Gamache*, *supra*, 48 Cal.4th at p. 409.)

Defendant identifies the ineffective assistance as trial counsel's failure to argue that the 2011 statute, rather than the 1989 statute, applied. We have no way of knowing, however, *why* defense counsel did not object to the amount of the restitution fine. As we will discuss in part V, *post*, at least with regard to the related parole revocation restitution fine, everyone present apparently assumed that 2011 law *did* apply. Hence, defendant cannot show ineffective assistance in this respect.

Defendant does not appear to argue that, *even if* defense counsel knew that 2011 law applied, she rendered ineffective assistance by failing to object or by failing to ask the trial court to consider defendant's ability to pay. If only out of an excess of caution, however, we note that defense counsel could have had a reasonable strategic purpose. For all we know, defendant had ample ability to pay a $10,000 restitution fine. He points out that he had a public defender; however, precisely because this issue was not raised below, we have no way of knowing whether there was contrary evidence. Moreover, "[w]hile imprisonment may limit a defendant's []ability to pay counsel [citation], it does not establish an inability to pay a restitution fine," because restitution fines can be collected out of a defendant's prison wages. (*People v. Dickerson* (2004) 122 Cal.App.4th 1374, 1380, fn. 8.) Finally, ability to pay is only one factor to be considered;

the trial court could set a $10,000 fine based solely on the gravity of the offense. (Pen. Code, § 1202.4, subd. (d); *People v. DeFrance* (2008) 167 Cal.App.4th 486, 505.)

We therefore conclude that defendant has not shown that defense counsel's failure to object to the amount of the fine constituted ineffective assistance.

V

MISCELLANEOUS SENTENCING ISSUES

The fact that defendant committed the crime in 1989 but was sentenced in 2011 gives rise to two additional sentencing issues. Even though defendant has not raised them, we address them on our own motion to prevent an unauthorized sentence.

A. *Personal Firearm Use Enhancement*.

The trial court imposed a five-year term on the personal firearm use enhancement (Pen. Code, § 12022.5, subd. (a)). In 1989, however, the prescribed sentence for this enhancement was only two years. (Pen. Code, former § 12022.5, subd. (a), Stats. 1988, ch. 1249, § 3, p. 4161.)

We are not entirely sure how the trial court arrived at its five-year sentence (which it described as the "upper term"). In 2011, the statutorily prescribed sentence was three, four, or *ten* years. (Pen. Code, former § 12022.5, subd. (a), Stats. 2004, ch. 494, § 4, p. 3157.)

The probation report correctly indicated that the appropriate sentence was two years. However, the "Crime Time" printout attached to the probation report indicated that the sentencing range was three, four, or *six* years. Even more confusingly, it then stated

that defendant's "[e]xposure" on this enhancement was five years. We can only assume that this is the source of the trial court's error.

We will reduce the sentence on this enhancement to two years.

B. *Parole Revocation Restitution Fine*.

In addition to a $10,000 restitution fine under Penal Code section 1202.4 (see part IV, *ante*), the trial court imposed a $10,000 parole revocation restitution fine under Penal Code section 1202.45.

In 1989, there was no such thing as a parole revocation restitution fine. Penal Code section 1202.45 was not enacted until 1995. (Stats. 1995, ch. 313, § 6, p. 1758.) It has been held that it is unconstitutional to apply Penal Code section 1202.45 to crimes committed before it became effective. (*People v. Flores* (2009) 176 Cal.App.4th 1171, 1181-1182; *People v. Callejas* (2000) 85 Cal.App.4th 667, 676-678.) Accordingly, we will strike the parole revocation restitution fine.

VI

DISPOSITION

The judgment is modified by (1) reducing the sentence on the personal firearm use enhancement (Pen. Code, § 12022.5, subd. (a)) from five years to two years, and (2) striking the $10,000 parole revocation restitution fine (Pen. Code, § 1202.45). Except as thus modified, the judgment is affirmed.

The superior court clerk is directed to prepare an amended sentencing minute order and an amended abstract of judgment, reflecting these modifications, and to forward a certified copy of the new abstract to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P. J.

CODRINGTON
J.